***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

75-7356

ORIGINAL

Docket Number 75-7356

B

P/S

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
----------X

In the Matter of the Arbitration
between

ROBERT P. HERZOG

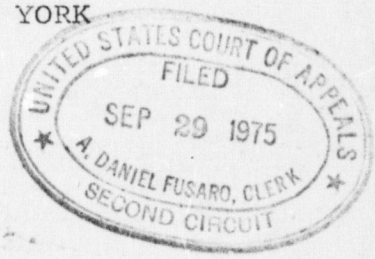
Petitioner-Appellee

v.

FRANK ROBINSON

Respondent-Appellant
----------X

APPEAL
FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK




APPELLEE'S BRIEF

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## PRELIMINARY STATEMENT

This matter commenced on September 6, 1972, when Robert P. Herzog, the appellee (hereinafter referred to as "Herzog") representing radio and TV stations owned and operated by WOR (RKO General) was retained in connection with an outstanding balance due WOR from a corporation known as Frank Robinson Advertising, Inc., located at 6835 Valjean Avenue, Van Nuys, California.

In connection therewith, Herzog contacted Gary A. Plotkin, Esq., of the law firm of Plotkin & Saltzberg, 10960 Wilshire Boulevard in Los Angeles and was advised that the debtor Frank Robinson Advertising, Inc.,(hereinafter referred to as FRA) was in financial straits and unable to meet its obligations as they matured.

On September 15, 1972, FRA, its attorneys, the larger creditors and their representatives, met at John Blair & Company, 717 Fifth Avenue, New York City. Approximately 16 or more of the larger creditors attended, the totality of whose claims represented 60% to 75% of the aggregate outstanding indebtedness of FRA. As a consequence of this initial meeting, the creditors present selected nine of the largest creditors to act as a Committee of Creditors and selected Herzog, as its counsel. A Moratorium Agreement evolved which, pursuant to Paragraph 13 thereof, became binding and effective when 80% in dollar amount of creditors consented thereto.

On behalf of the Committee, Herzog obtained the necessary number of consents and the agreement became effective. In connection therewith, FRA and its affiliate corporation executed a security agreement and appropriate financing statements, which were filed with the Secretary of State of California. Herzog received, in accordance with the Moratorium Agreement, the outstanding shares of stock of FRA and Plastimaid, Inc., owned by Frank Robinson, the appellant (hereinafter referred to as Robinson), with stock powers in blank.

After notification, FRA subsequently deposted sufficient funds so that in January of 1973 the initial cash distribution contemplated by the Moratorium Agreement of 10% was disbursed through a special bank account maintained in the Charter Bank, Los Angeles, California, which checks were countersigned by Gary A. Plotkin, Esq. on behalf of FRA and Robert P. Herzog, Esq. on behalf of the Committee. Additionally, all accounts under $1,000.00 were paid in full, with the option to those creditors whose claims were less than $1,500.00 to reduce their claim to the sum of $1,000.00 and be paid in full.

Pursuant to the agreement, an additional dividend of 40% was due and payable in March of 1973. The Committee was informed that the debtor did not have sufficient funds to meet its commitment and, accordingly, instead of a 40% dividend FRA was only able to make partial payments aggregating approximately 24.5%.

After subsequent negotiations and broken promises by Robinson, the Committee authorized Herzog to declare a default in the Moratorium Agreement and to pursue the remedies set forththerein. On July 18, 1973, Herzog by certified mail notified the interested parties to the Moratorium Agreement that same was in default pursuant to the provisions thereof. After the time to cure default had expired, Herzog, on August 17, 1973, notified the interested parties of a special meeting of the stockholders of FRA and also served a notice of foreclosure pursuant to the security agreement.

Herzog went to California for the purpose of attending the stockholders meeting and foreclosure sale which resulted in conferences and negotiations with Mr. Plotkin and Mr. Robinson, from which the Offer, containing provisions for arbitration in the event of dispute, which is the subject matter of the instant proceeding, arose.

Pursuant to the terms of the Offer, Herzog as escrowee thereunder, received a Promissory Note collateralized by a deed and an assignment of a lease relating to two parcels of property in the State of Hawaii.

Herzog was authorized by the Committee to circularize each of the creditors with a view towards soliciting their acceptance to the new proposal which, if accepted, would be substituted in place and instead of the original Moratorium Agreement of October, 1972. Herzog received the necessary acceptances to Robinson's offer and so notified counsel for Robinson, Gary A. Plotkin, Esq, verbally and in person in Herzog's office on November 19, 1973 at a luncheon conference attended by Herzog and Plotkin as well as others.

Subsequently, from time to time and until the service of the demand for arbitration dated February 4, 1974, Herzog had numerous telephone conferences with Mr. Plotkin concerning the time when it could be expected and anticipated that Mr. Robinson, the appellant, would be in a position to post the necessary funds sufficient to proceed on the new proposal. Herzog was informed by Mr. Plotkin that Robinson was having difficulty in assembling the cash necessary for various reasons, such as difficulty in liquidating the numerous Hawaiian properties that Robinson owned, the proceeds of some of which were to form part of the contemplated payment to creditors, and further difficulties involving liquidation of Robinson's pension and/or retirement fund in a sum reported to be in excess of $50,000.00.

As time dragged on and Robinson's default in posting the funds necessary continued, Herzog, as escrowee, and with the Committee's authorization, demanded arbitration pursuant to the provisions of the August 27, 1973 Offer.

After adjournment by Robinson, the arbitration was held in New York, New York under the Commercial Rules of the American Arbitration Association before three arbitrators on July 29th and July 30th, 1974. After hearing all the arguments of both sides with regard to questions of fact and law, and after reading and analyzing the briefs of counsel, the arbitrators rendered their award on November 27, 1974, deciding the arbitration unanimously in favor of Herzog.

Herzog then moved to confirm the award in Supreme Court, New York County. Robinson thereupon removed said proceeding to the United States District Court for the Southern District of New York on the basis of diversity of citizenship and jurisdictional amount. The District Court, Judge Lloyd F. MacMahon presiding, heard the case. Memorandums of law and affidavits were submitted by both sides, and Judge MacMahon heard oral argument on March 7, 1975. After due consideration of all the issues raised by appellant, Judge MacMahon rendered his decision in a memorandum opinion on May 2, 1975, which decision granted Herzog's motion and denied Robinson's motion. Judgment thereon was entered May 14, 1975. It is that judgment confirming the arbitration award, from which the instant appeal is taken.

## ARGUMENT

The Court below heard and reviewed each and every argument of the appellant concerning both alleged misconduct and imperfectly executed powers of the arbitrators, as well as the exceeding of arbitrators' powers, found them to be without merit and correctly confirmed the award.

The failure of the appellant to demonstrate the existance of any of the grounds for vacating the arbitration award, mandates confirmation of the arbitration award, and the decision below should be in all respects affirmed.

## POINT I

### APPELLANT IS TRYING TO RE-LITIGATE AND RE-ARGUE EVERY ISSUE OF FACT AND LAW DECIDED BY THE ARBITRATORS AND REVIEWED BY THE DISTRICT COURT BELOW

Appellant, in the District Court below, sought to vacate an arbitration award of the American Arbitration Association which award was rendered in New York, by trying to show that the arbitrators were guilty of misconduct and that they had exceeded their powers or imperfectly executed same. This he failed to do. Appellant now, by use of the same voluminous cross-references to the minutes of the arbitration hearing, memorandums and briefs of law submitted to the arbitrators, and even letters and correspondence, again seeks by means of this appeal a second review of every issue of both fact and law submitted to the arbitrators, despite the fact that mistakes of fact or law by the arbitrators are not subject to review unless the arbitrators were guilty of misconduct.

Appellant is well aware of the very narrow grounds upon which an award may be vacated, yet he continues to burden the Court with re-arguments of every matter presented and decided in good faith by the arbitrators, and reviewed by the Court below in confirming the award. As stated long ago in

Matter of Wilkins, 169 N.Y. 494, 62 N.E. 585;

> "Where the merits of a controversy are referred to an arbitrator selected by the parties, his determination, either as to the law or the facts, is final and conclusive, and a Court will not open an award unless perverse misconstruction or positive misconduct upon the part of the arbitrator is plainly established, or there is some provision in the agreement of submission authorizing it. The award of an arbitrator cannot be set aside for mere errors of judgment, either as to the law or as to the facts. If he keeps within his jurisdiction and is not guilty of fraud, corruption or other misconduct affecting his award, it is unassailable, operates as a final and conclusive judgment, and however disappointing it may be the parties must abide by it."

Appellant has failed to show either misconduct or perverse misconstruction on the arbitrators' part, and has consequently failed to show any grounds for vacating the award. Appellee will not burden this Court with responses to each of the endless arguments proferred by appellant, which he alleges constitute mistakes of fact or law by the arbitrators, but rather will confine himself to arguments in support of the decision of Judge MacMahon.

## POINT II

### JUDGE MacMAHON CORRECTLY DECIDED THAT JOINDER OF THE PARTIES WAS UNNECESSARY

Appellant, both in the Court below and here, claims that the arbitrators were guilty of misconduct and that he was

prejudiced because the arbitrators refused to join certain parties that appellant requested. Among those he wanted joined were people who were not even parties to the Offer which was the subject of the arbitration. Both the arbitrators, who were skilled commercial attorneys, and Judge MacMahon rejected the idea that they should have been joined.

Appellant made a motion in the arbitration proceedings to join creditors whom he considered necessary to the arbitration. Memorandums of law were submitted on this question, and the arbitrators rejected appellant's contention. Appellant then raised the issue again before Judge MacMahon, adding at that point that the arbitrators' refusal to join was not only misconduct and prejudice, but also the refusal resulted in an imperfect execution of their powers in that a mutual, final and definite award was not made. Again, the issue was extensively covered by both sides in memoranda of law, and again, the contention was rejected. Once more the appellant raises the same issue herein.

Judge MacMahon agreed with the arbitrators that the creditors were neither indispensable nor necessary. Since Herzog throughout the arbitration, and even before the arbitration, was the duly authorized representative of the creditors, they were bound by the arbitrators' decision. It was correctly decided that no prejudice would accrue because of the non-joinder, since the rights of all the parties to the Offer had to be determined initially by

arbitration under the Offer, and no suit could be brought by any party, including a creditor, until arbitration had decided the rights of the parties under the Offer.

No viable reason was put forward by appellant for even the permissible joinder of the creditors. Whether there was an adequate number of acceptances to make the Offer operative was determined by the arbitrators through the written acceptances which Herzog, their representative, received from the creditors. To have required so large a number of people to participate would have been pointless and counter-productive, since once they accepted the Offer by filing the written acceptances with their representative, Herzog, the award of the arbitrators concerning any dispute under the Offer was binding on them.

Judge MacMahon also correctly disposed of appellant's final argument that he was prejudiced in that he may be subject to multiple litigation because of the non-joinder of the parties when, citing 3 Am. Jur. 2d Agency, § 265 at 629 (1962), he reiterated the proposition that any payment to an authorized representative of a creditor is payment to the creditor and discharges the debtor's responsibility pro tanto. And this is even more evident when one considers the fact that not only was Herzog the representative of the creditors, but also

the escrowee of the deposit under the Offer, which position made him a fiduciary, who would be surcharged for any misfeasance on his part by the creditors. Appellant was well aware that Herzog, and not appellant, would be liable for any funds which come into Herzog's hands.

The appellant cites two cases on Page 26 of his brief in support of his contention that the non-joinder of certain parties should lead to the vacatur of the arbitration award. But both cases are easily distinguished from the case at bar. In Seldner Corporation v. W. R. Grace & Co., 22 F. Supp. 388, the plaintiff asked to be given notice and to heard, but the arbitrators said that it was not necessary, as they considered the matter to be an appraisal more than an arbitration. Petrol Corporation v. Groupement D'Achat Des Carburants, 84 F. Supp. 446, which appellant cites as supportive of vacatur of the award, the court affirmed the award because, even though the complaining party was not given notice of the time and place of the hearing, both parties acquiesced to the procedures used.

Appellant cannot, by any stretch of the imagination, say that he was not given notice or was not heard. Appellant made a second motion for an adjournment purportedly to join certain parties, and to dismiss because certain allegedly necessary parties had not been given notice. After hearing argument by both sides (see Appendix pp. 36-47), the motion for an adjournment was denied, and decision on the motion to dismiss was reserved. Appellant cannot be heard to complain that he has been deprived of due process nor precluded in any respect.

## POINT III

### THE REFUSAL TO GRANT AN ADJOURNMENT IS A MATTER WITHIN THE DISCRETION OF THE ARBITRATORS, AND THE REFUSAL OF THE ADJOURNMENT DID NOT FORECLOSE A PRESENTATION OF EVIDENCE

As stated in Judge MacMahon's memorandum decision below, the decision to allow or refuse an adjournment is discretionary with the arbitrators, and on the facts presented, there was no abuse of that discretion on the part of the arbitrators in the case at bar. Nor did this refusal foreclose the presentation of evidence to the prejudice of appellant. Arbitrators must be given discretion to determine whether additional evidence is necessary. Catz American Co. v. Pearl Grange Fruit Exchange., Inc., 292 F. Supp. 549, 553 (S.D.N.Y. 1968).

Appellant's contention that the arbitrators were guilty of misconduct in refusing to grant him an adjournment, and that this refusal foreclosed presentation of evidence is completely without merit. In order for a refusal to adjourn an arbitration hearing to rise to the level of misconduct, the refusal must foreclose a presentation of evidence, because generally the refusal to grant or refuse an adjournment is a matter within the discretion of the arbitrator, A & R Construction Co., Inc. v. Gorlin-Akun, Inc. (1973) 41 A.D. 2d 876, 342 N.Y.S. 2d 950.

Appellant claims misconduct by the arbitrators because he was not given adequate time to prepare his case because of the arbitrators' refusal to grant a further 3 or 4 week adjournment. The facts completely fail to justify this contention. If anything, the converse is true, in that, it was to the prejudice of Herzog because of Robinson's actions. The demand for arbitration was dated February 4, 1974. The AAA, after certain communications between the parties respecting venue, mailed calendar forms for May and June to the parties. Robinson's attorney, Plotkin, because of trial commitments, asked that the arbitration be set for July 15 and July 16, 1974. Herzog agreed to this further date provided the date set be made "peremptory, final and not further adjournable against Robinson." Robinson, through his attorney, Plotkin, agreed. Then on the eve of trial, Robinson dismissed Plotkin, and retained new counsel. Robinson's new counsel then asked for a further delay to August 12, 1974. The arbitrators provisionally denied same. Upon a renewal of this application on July 15, 1974, the arbitrators granted Robinson a further two week adjournment to July 29, 1974. Robinson now asserts his was prejudiced by failure to receive the additional fourteen days requested. Robinson also received permission to inspect the consents which Herzog held. Thereafter, Robinson sought to depose Herzog and Plotkin, which was properly denied.

When the arbitration was held, Robinson presented in evidence an affidavit from Plotkin which was admitted. Robinson used this affidavit to bolster his case. Robinson also cross-examined Herzog extensively. Robinson now complains he was prejudiced, when in fact, the opposite is true.

It was Herzog, not Robinson, who was forced to abide the delays because of the adjournments. And it was Herzog who was unable to impeach or cross-examine Plotkin's affidavit. It was to appellant's advantage, not prejudice, to have Plotkin absent. And it was Herzog who was denied the opportunity to examine Plotkin because he was not present at the hearing, because appellant Robinson on the eve of the arbitration, dismissed Plotkin, the attorney who participated in drafting the Offer which was the subject of the Arbitration. And it was Herzog, not Robinson, who was forced to abide Plotkin's self-serving statements which appellant presented at the hearing in the form of an affidavit.

The best evidence of the appellant's non-foreclosure is supplied by his attorneys in their "opening brief" to the arbitrators. In it, they said, on p. 38:

> "...we believe that the Arbitrators have the authority to adjudicate all issues presented to them, and we believe that the Arbitrators have heard <u>all of the evidence bearing upon these issues</u>...." (Emphasis added). (See Exhibit 10 of Appellant's cross-motion to vacate the award in the District Court).

Despite their previous admission, the appellant's attorneys now have the temerity to urge in support of vacation of the award, that the arbitrators were guilty of misconduct because the arbitrators did not hear all the evidence.

Appellant, once again, would have this Court review each and every action taken by the arbitrators in good faith, and again cites cases purportedly in support of his contentions concerning misconduct in refusing to adjourn. Yet an examination of those cases will show that each of them is very different from the case at bar. An adjournment is discretionary, and plainly there was no abuse of discretion here, as appellant was given every opportunity to present all his evidence. Appellant, and the Court below were well aware that the rulings of the arbitrators did not prevent overall fairness in the proceeding, despite his citation of the case of Newark Stereotyper's Union No. 18 v. Newark Morning Ledger Co., 397 F. 2d 594 (3rd Cir. 1969) cert. den 393 U.S. 954. If anything, the above-cited case is supportive of appellee.

> "The Court cannot act as a legal screen to comb the record in an arbitration case for technical errors in receipt or rejection of evidence by arbitrators, who in most cases are laymen." (Id. 599)

This quotation is even more relevant in the context of the instant arbitration, because the arbitrators were not laymen, but rather attorneys well-skilled in commercial law.

As can be plainly seen from the record, the arbitrators heard all the relevant evidence and were absolutely not guilty of any misconduct and there do not exist any grounds for vacating their award.

## POINT IV

### THE AWARD IS MUTUAL, DEFINITE AND FINAL, AND WAS CORRECTLY CONFIRMED BY THE COURT BELOW

When the dispute concerning the Offer was submitted to arbitration, the arbitrators were asked to decide three things:

1) Was the Offer accepted by the requisite number (80%) of amount owed creditors in order to make the Offer a binding enforceable agreement?

2) If it was accepted, was there a breach of the Offer?

3) If it was accepted, what were the damages? (See Appendix - p.91)

After full and lengthy hearings, the arbitrators decided all the issues before them, and found in favor of Herzog, the appellee herein. Every aspect and all of the circumstances concerning the Offer were fully investigated. The arbitrators heard every argument of Robinson concerning his interpretation of the various terms of the Offer. During the arbitration, Robinson also requested the arbitrators to include and to rule on various

other questions which had nothing to do with the Offer which they were asked to arbitrate. Principal among these requests was a request to decide the status of the prior Moratorium Agreement. The arbitrators considered the request fully, and correctly rejected appellant's request, since same was not an issue before them. For them to have ruled on such a separate agreement would have been completely outside their powers. (See Appendix pages 91 to 104).

Robinson again urges this Court to consider those questions. Appellant is fully aware of the limited scope of Court review concerning the confirmation of an arbitration award, but he persists in advocating a position whereby he would have this Court review each and every finding of fact and law decided by the arbitrators after a detailed hearing which included oral argument, memoranda and briefs of law, and extensive examination and cross-examination of the parties to the arbitration. This is clearly impermissible. See, Sobel v. Hertz, Warner & Co., 469 F.2d 1211 (1972); also Southeast Atlantic Shipping Ltd., v. Garnac Grain Company, 356 F.2d 189 (1966).

The issues brought before the arbitrators were clear, were decided by them in good faith, and the award is mutual, definite and final. Appellant's brief cites cases purportedly in support of his position, but a close examination of the cited cases shows that appellant is merely reciting general, well-known propositions

concerning arbitration, which have absolutely no relevance to the instant proceeding. All the cases cited by appellant on pages 35 to 37 of his brief involved situations requiring remand to the arbitrators for clarification of some point. Appellee concedes their value as general propositions, but fails to see any connection between those cases, which deal with labor arbitrations concerning back pay, common law arbitrations, disputes between contractors and sub-contractors under construction contracts, mechanics' liens, and the delegation of the arbitrators' powers to an accountant, and the instant proceedings.

Appellant has utterly failed to show any reason why the award should be vacated. He seeks to have this Court re-consider every issue of fact and law which were raised before the Court below, and in arbitration, and were fully considered, and properly rejected twice before. It is impermissible for this Court to re-evaluate and re-interpret his myriad arguments. The award of the arbitrators is clear, and appellant cannot, by use of his twisted interpretations of every fact and issue of law, be allowed to re-litigate them again. See Sobel v. Herty, Warner & Co., supra.

POINT V.

JUDGE MACMAHON AND THE ARBITRATORS CORRECTLY DECIDED THAT THE DAMAGES AWARDED WERE THE LIQUIDATED, IMMEDIATE DAMAGES DUE THE CREDITORS UPON APPELLANT'S BREACH OF THE OFFER AFTER ACCEPTANCE

New York, and not California law as appellant contends, controls the Offer which was submitted to arbitration. This is clear and based on well-recognized conflicts of Law principles:

1) the action for confirmation was removed from a New York Court by appellant;

2) the arbitration was held in New York;

3) appellee herein is a New York resident; and

4) the Offer in dispute became a binding agreement when the requisite acceptances were received in New York.

During the course of the arbitration, both Herzog and Robinson presented their arguments with regard to the $50,000.00 damages which Herzog demanded, as escrowee, for Robinson's breach of agreement. The arbitrators, all of whom were experienced lawyers, listened to the arguments and considered the briefs containing elaborations on the subject of damages, and concluded upon all of the evidence submitted that the said sum, which represented 5% of the claims of the creditors, and became due and owing to the creditors upon their acceptance of the Offer, represented damages and was not a penalty or forfeiture. The One million dollars of creditors, who by the terms of the Offer and subsequent acceptance were to receive 5% of their claims in cash upon acceptance, were therefore damaged as a result of Robinson's breach

and entitled to that sum, which represented their immediate liquidated damages.

After the breach of the Moratorium Agreement, the creditors had little further faith in Robinson's broken commitments. Robinson was fully aware that, in order for the creditors to accept less than full payment by means of another agreement, he would have to provide the creditors with something more substantial than a barren promise to pay. Cognizant of this condition, Robinson proposed the Offer which contained the $50,000.00 deposit. The Offer, as proposed by Robinson contained two alternatives for payment. The first would have given creditors 10% of their claims in cash in full payment, and the second offered creditors an immediate 5% payment upon acceptance, with future deferred payments of an additional 20%.

Upon the required acceptance by 80% of the amount owed creditors, the Offer became a binding agreement. The $50,000.00 promissory note given to Herzog, and the collateral securing it, together with the recommendation of the creditors committee was, without doubt, the inducement which persuaded the creditors to accept the Offer. The creditors were thereby in some measure assured of receiving the immediate 5% which was the minimum cash payment necessary in the event the Offer was accepted, since Herzog had a note for $50,000.00 backed by collateral, and it represented 5% of the amount owed creditors. The collateralized promissory note was deposited to demonstrate Robinson's bona fides, and to show the creditors that there was immediately available 5% upon

acceptance.

Robinson asserts that the $50,000.00 was a penalty rather than a deposit on Offer. It is unfathomable to expect anyone to believe that creditors, who already were the recipients of two broken promises, would accept another empty promise to pay. Robinson, by depositing the minimum and initial payment of 5% which creditors were to receive in the form of a collateralized note, demonstrated his good faith. This deposit of $50,000.00 was without doubt a primary motivation for creditors to accept Robinson's offer, since it represented the minimum payment of 5% thereunder.

Furthermore, the $50,000.00 deposit represented the immediate liquidated damages suffered by creditors as a result of Robinson's failure to pay. This is what the deposit on offer represented, and upon breach by Robinson, the deposit became the amount of immediate liquidated damages which the creditors were entitled to. This proposition was recognized in Agositino v. State, N.Y.S. 2d 732, 255 A.D. 264:

> "It has been stated as a general rule that whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he would indemnify the creditor for the wrong which has been done him; and that a just indemnity can never be less (though it may sometime be more) than the specified amount of money or the value of the property or services, at the time it should have been paid or rendered....." (Id. 734)

Robinson contends that the $50,000.00 was a penalty or forfeture because it had no relation to the damages suffered by the creditors upon his breach. It is, however in fact, an amount equal to the immediate damages suffered by the creditors as a result ofhis failure to perform. The amount Robinson owed the creditors was estimated at $1,100.000.00 by Herzog, and Robinson claimed that it was somewhere nearer $900,000.00. The figure of $50,000.00 represents approximately 5% of $1,000,000.00. The deposit was a reasonable amount, not an arbitrary figure imposed on Robinson which bears no relation to the damages. "Damages need not be proved with absolute certainty and mathematical accuracy." (Kaufman v. Gordon, 197 N.Y.S. 2d 1013, 1022).

Both sides to the arbitration argued the issue of damages in the event the arbitrators found that Robinson had breached the Offer. In arriving at the award, the arbitrators concluded that the agreement was breached by Robinson. Thus the deposit represented by the $50,000.00 note, was reasonable damages and enforceable. Admittedly, $50,000.00 was not the full extent of the damages suffered by the creditors. The damages suffered constituted the aggregate monetary value of the offer as accepted by creditors.

But it is clear that the creditors elected to take only the amount of their immediate liquidated damages represented by the $50,000.00 rather than their total damages. It is settled case law in New York that where an amount of liquidated damages is agreed to by the parties, as here, the party damaged by breach of the contract can only get the liquidated damages agreed upon, and not the actual damages suffered. See Downtown Harvard Lunch Club v. Rasco, Inc., 201 Misc. 1087. Appellant was fully aware of this throuthout the arbitration proceedings, and this fact is further bolstered by Herzog's statement during those proceedings that Robinson's personal liability under the breached agreement was limited to $50,000.00 should the arbitrators find that there was a breach thereof.

But more important is the fact that appellant admits that the issue of the damage clause was fully argued before the arbitrators. Yet, he now argues it again before this Court. Appellant cannot re-argue the position again, as a mistake of fact or law is not grounds for the vacation of an arbitration award. Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805 (C.A.NY. 1960), cert. denied, 363 U.S. 843.

Finally, appellee is constrained to point out to the Court that the cases cited by appellant again are not on point, and, if they have any relevance whatsoever, it is merely as general propositions of law. His recitation of the case law of California is completely inappropriate to the case at bar, not only because California law is not controlling, but also because they bear no correlation to the factual situation presented here.

While appellee agrees with the general proposition of Garrett v. Coast and Southern Federal Savings & Loan Association, 9 Cal. 3d 731, 511 P.2d 1197 (1973) cited on page 41 of appellant's brief that a main feature of a penalty is its lack of proportional relation to the damages which flow from the breach, it has no relevance to the case at bar as the damage clause in the Offer represented the 5% payment that creditors were to receive upon acceptance of the Offer.

Appellant also cites on p. 41 two more inappropriate cases, Greenbach Bros. Inc. v. Burns and Cook v. King Manor Convalescent Hospital, which purport to support his argument concerning the damages awards. In both cases, the factual situation involved a deposit to be used as damages in connection with offers to purchase real property. The California court held that the deposits were illegal penalties because they bore no relation to the actual

damages sustained by the owner because of the buyer's refusal to purchase. Upon breach, the seller still retained the real property. Appellee contends these cases are inapposite.

Appellant continues his deluge of non-appropriate, irrelevant citations of cases to the point of absurdity on pages 42 to 44 of his brief with the citation of cases where the Courts refused to confirm arbitration awards because they violated public policy or were illegal contracts. In the case of Black v. Cutter Laboratories, 43 Cal. 2d 788, 278 P.2d 905 (1955) the Court refused to confirm a labor arbitration award that reinstated a communist party member to employment in a plant which made antibiotics for the military because such an action was void as against the public policy of both Federal and state laws.

In Staklinski v. Pyramid Electric Company, 6 A.D. 2d 565, 180 N.Y.S. 2d 20 (1st Dep't. 1958) the New York court enforced an arbitration award reinstating a management employee, even though it was a personal services contract, and Courts of equity do not usually enforce personal services contracts because of the obvious involuntary servitude problems. Matter of Aimcee Wholesale Corporation (Tomar Products), 21 N.Y. 2d 621, cited by appellant on page 43 of his brief, concerned an arbitration of what one party claimed was a violation of the state's anti-trust policy, enforcement of which, the Court said, cannot be left to commercial arbitration.

While the above-cited cases obviously bear no relation to the factual or legal questions involved in this appeal, the height of absurdity is reached with appellant's citation of Hurd v. Hodge, 334 U.S. 24, 68 S. Ct. 847 (1948). This was the case where the Supreme Court refused to enforce restrictive covenants on real property, which covenants forbade sale of the property to Negroes.

These public policy cases have nothing whatever to do with the case on appeal, and appellant does not even make an attempt to show any relevancy between them and the case on appeal, either factually or on the question of law presented.

POINT VI.

APPELLANT'S APPEAL IS FRIVOLOUS AND WITHOUT MERIT, THE SOLE PURPOSE OF WHICH IS TO DELAY THE ENFORCEMENT OF THE ARBITRATION AWARD

It is obvious that appellant is using this appeal solely as a means to delay the enforcement of the arbitration award. Such delay, which is now more than nineteen months since demand for arbitration was made, is prejudicial and detrimental to the rights of the creditors involved.

It is appellee's further belief that there is absolutely no merit to the instant appeal, as has been shown by appellant's attempt to re-argue every issue of fact and law decided by the

arbitrators when appellant is fully aware that mistakes of fact or law are not grounds for vacating an arbitration award. The lack of merit of this appeal is also conclusively demonstrated by appellant's citation of cases which, upon careful review, lack any relevancy with the issues raised in the instant appeal.

This Court should accordingly dismiss the appeal on its merits as frivolous so that the appellee may proceed with the enforcement of the arbitration award. Further, because of the obvious delaying tactics by appellant, this Court should award appellee damages and double costs pursuant to 28 U.S.C. 1912.

## CONCLUSION

This Court should dismiss the instant appeal on its merits as frivolous, affirm the confirmation of the arbitration award of the District Court, and grant appellee herein damages and double costs.

Respectfully submitted,

ROBERT P. HERZOG
Appellee Pro Se

9/29/75 11:20AM